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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

MUNIR ADIBDAA MUHAMMEEM,

Defendant and Appellant.

D052190

(Super. Ct. No. SCD208403)

APPEAL from a judgment of the Superior Court of San Diego County, Cynthia Bashant, Judge. Affirmed, as modified.

A jury convicted Munir Adibdaa Muhammeem (also known as Elijah Pathfinder) of selling cocaine base (Health & Saf. Code, § 11352, subd. (a))¹ (count 1), possessing cocaine base for sale (§ 11351.5) (count 2), and possessing a controlled substance (§ 11350, subd. (a)) as lesser included offenses to both counts. The court sentenced Muhammeem to prison for the lower term of three years on count 1 and the lower term of

¹ All further statutory references are to the Health and Safety Code unless otherwise specified.

three years on count 2. Execution of sentence on count 2 was stayed under Penal Code section 654. No sentence or other disposition was made on the two lesser included possession convictions.

On appeal Muhammeem contends (1) the evidence was insufficient to support his conviction of possessing cocaine base for sale, (2) the convictions for the lesser included offenses of simple possession must be stricken because convictions of both the greater offenses and the lesser included offenses are impermissible, and (3) the court's instruction under CALCRIM No. 358 lessened the prosecution's burden of proof as to reasonable doubt and his convictions on counts 1 and 2 must therefore be reversed. We conclude the lesser included offense convictions must be stricken. In all other respects the judgment is affirmed.

FACTS

On August 14, 2007, San Diego Police Officer Esmeralda Tagaban and other officers conducted a narcotics buy/bust operation on C Street in downtown San Diego. Officer Tagaban disguised herself as a drug user with clothing typically worn by crack cocaine users on the streets, discolored her teeth and skin to make them look dirty, and discolored her fingertips to look gritty and burnt. She carried two \$20 bills and two \$5 bills to purchase narcotics, the serial numbers of which were prerecorded.

Between 8:00 and 8:15 p.m., Officer Tagaban encountered Muhammeem on C Street, and they greeted each other. Muhammeem, a 50-year-old man who had been homeless for 15 years, asked her, "What are you up to?" Officer Tagaban responded she

was "looking for a 20."² Muhammeem told her he just bought a "50"³ and would give some to her. Officer Tagaban refused to share drugs with him and, in search of his seller, asked Muhammeem who sold him the drugs. Muhammeem asked her why she did not want any of his drugs. She held the \$20 bill in her outstretched hand, he took the bill, cupped his hand underneath his chin and spit out an off-white rock substance, later determined to be 0.09 grams of cocaine base. Muhammeem handed the cocaine base to Officer Tagaban. After Officer Tagaban attempted to elicit more information about Muhammeem's seller, Officer Tagaban and Muhammeem walked away from each other.

Officer Lee Martin received Officer Tagaban's buy/bust signal and detained Muhammeem. Officer Martin searched Muhammeem and found a knife, a \$20 bill matching one of the prerecorded bills, and a glass pipe. Muhammeem had no other possessions associated with drug sales such as a pager, cellular telephone, packaging materials, money, pay-owe sheets, or any drugs.

Officer Tagaban joined Officer Martin after he arrested Muhammeem. Muhammeem cooperated with Officer Tagaban during a 15-minute unrecorded interview during which Officer Tagaban took shorthand notes. Muhammeem told her he purchased drugs for personal use and "hit the pipe" shortly before he saw her on C Street. During the interview he did not appear to be under the influence of drugs.

² A "20", in street terms, means \$20 worth of narcotics or 0.20 grams of cocaine base.

³ A "50" refers to \$50 worth of narcotics or 0.50 grams of cocaine base.

At trial, Muhammeem testified he did not want or intend to sell cocaine to Officer Tagaban but to smoke it with her, possibly in return for sexual favors.

DISCUSSION

I. *SUFFICIENCY OF THE EVIDENCE*

A. *Standard of Review*

The critical inquiry on review of the sufficiency of the evidence is whether the record reasonably supports a finding of guilt beyond a reasonable doubt. This inquiry does not require a court to "ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt.' [Citation.] Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*Jackson v. Virginia* (1979) 443 U.S. 307, 318-319; *People v. Johnson* (1980) 26 Cal.3d 557, 576.) Thus, "[i]f the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment." [Citations.]" (*People v. Bean* (1988) 46 Cal.3d 919, 933; *People v. Stanley* (1995) 10 Cal.4th 764, 793.)

Applying these principles to the present case, we conclude that substantial evidence supports defendant's conviction for possession of cocaine base for the purpose of sale.

B. Analysis

Possession of narcotics for sale "requires proof the defendant possessed the contraband with the specific intent to sell it and with knowledge of both its presence and illegal character." (*People v. Meza* (1995) 38 Cal.App.4th 1741, 1745-1746; *People v. Parra* (1999) 70 Cal.App.4th 222, 225-226.) The "[i]ntent to sell may be established by circumstantial evidence." (*People v. Harris* (2000) 83 Cal.App.4th 371, 374.) Further, as the jury was properly instructed, they could consider Muhammeem's prior conviction for sale of a controlled substance to determine his intent in this case. (CALCRIM No. 375 [Evidence of Uncharged Offense to Prove Identity, Intent, Common Plan, etc].)

Muhammeem's act of grabbing the \$20 bill from Officer Tagaban and giving her 0.09 grams of cocaine base from the larger amount he was hiding in his mouth is sufficient to establish the requisite intent for possession for sale of cocaine base. The jury was also presented with evidence he had a prior conviction for selling cocaine base, which, as noted, *ante*, can properly support the intent element of count 2. Further, even Muhammeem's own account of the incident shows there is substantial evidence to support the intent element. He testified that when he met Officer Tagaban, he thought she was someone with whom he could exchange cocaine for a sexual favor. As the court instructed the jury, and the prosecutor argued in closing argument, swapping the cocaine base for a sexual favor constituted a sale. (CALCRIM No. 2302 [Possession for Sale of Controlled Substance] ["Selling for the purpose of this instruction means exchanging [cocaine base] for money, services or anything of value"].)

Nor does it matter there was no expert testimony that the cocaine base he possessed was for sale, rather than personal use. Courts allow experienced narcotics officers to give an opinion that drugs possessed by a defendant are for sale, based upon the quantity, packaging, and other factors. (*People v. Harris, supra*, 83 Cal.App.4th at pp. 374-375.) However, no case has held that such an expert opinion is *required* to prove intent.

Further, the fact that there was also evidence he possessed cocaine for personal use and did not have some items usually associated with sellers does not negate the intent element. Sellers are often also users. Further, the fact there was some evidence from which a jury *could* conclude Muhammeem possessed the cocaine base for personal use is irrelevant to our review of whether substantial evidence supports the conviction. ""[T]he opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment." [Citations.]" (*People v. Bean, supra*, 46 Cal.3d at p. 933; *People v. Stanley, supra*, 10 Cal.4th at p. 793.)

II. LESSER INCLUDED OFFENSES

Muhammeem contends the jury erroneously convicted him of both sale of cocaine base and possession for sale of cocaine base, and the lesser included offenses of simple possession of a controlled substance (§ 11350), and claims the convictions of the lesser included offenses should be stricken. The People agree that the lesser included offenses must be stricken.

A person may not suffer convictions of both a greater and lesser necessarily included offense. (*People v. Montoya* (2004) 33 Cal.4th 1031, 1034.) If a defendant is convicted of a greater offense, the conviction of a necessarily lesser included offense must be reversed. (*People v. Moran* (1970) 1 Cal.3d 755, 763.) Therefore, we must strike the convictions for the lesser included offenses on counts 1 and 2.

III. INSTRUCTION UNDER CALCRIM NO. 358

Muhammeem asserts the trial court's instruction under CALCRIM No. 358 lessened the People's burden of proof on counts 1 and 2 to less than beyond a reasonable doubt. Muhammeem asserts that the italicized portion of that instruction, quoted, *post*, "You must consider with caution evidence of a defendant's oral statement *unless it was written or otherwise recorded*," told the jury it need not apply its usual caution when viewing Muhammeem's out-of-court statements to Officer Tagaban because Officer Tagaban took notes of her conversation with him. This contention is unavailing.

A. Background

The court instructed the jury under CALCRIM No. 358 as follows:

"You have heard evidence that the defendant made an oral or written statement before trial. You must decide whether or not the defendant made any of these statements, in whole or in part. If you decide that the defendant made such statements, consider the statements, along with all the other evidence, in reaching your verdict. It is up to you to decide how much importance to give to such statements. [¶] You must consider with caution evidence of a defendant's oral statement *unless it was written or otherwise recorded*." (Italics added.)

Muhammeem did not object to the instruction.

B. *Analysis*

The language of the sentence at issue and, in particular, the use of the pronoun "it" (CALCRIM No. 358), properly conveyed to the jury the notion that the jury was to view evidence of Muhammeem's statement with caution unless the statement itself was recorded in such a manner so as to obviate any concern with respect to whether the statement was in fact made. (Cf. *People v. Slaughter* (2002) 27 Cal.4th 1187, 1200 ["the purpose of the cautionary instruction is to assist the jury in determining if the statement was in fact made"].) There is no likelihood that the jury would have understood the instruction to provide that Muhammeem's statements were "written or otherwise recorded" merely because Officer Tagaban documented the statements with written notes. Rather, the instruction clearly sets forth that it is only when the statement *itself* was recorded that the jury need not view it with caution.

Further, to the extent that Muhammeem is claiming that the trial court erred by failing to clarify the meaning of "otherwise recorded," it was incumbent upon him to request such clarification in the trial court. Since he did not request clarification of the instruction, Muhammeem has forfeited any such challenge on appeal. (See *People v. Coffman* (2004) 34 Cal.4th 1, 122.)

DISPOSITION

The convictions on the lesser included offenses to counts 1 and 2 are stricken. In all other respects, the judgment is affirmed.

NARES, Acting P. J.

I CONCUR:

IRION, J.

McDONALD, J., concurring and dissenting.

The evidence was insufficient to support the guilty verdict on count 2 (possession of cocaine base for sale -- Health & Saf. Code, § 11351.5)¹ and defendant's conviction on count 2 should therefore be reversed; also, the conviction on the lesser included offense to count 1 should be stricken. Otherwise, I concur in the substance of the majority opinion. The matter should be remanded for sentencing to include sentence on the lesser included offense of simple possession to count 2.

The possession and intent elements of sections 11352, subdivision (a),² and 11351.5³ are different. Conviction of violating section 11352, subdivision (a), requires the prosecution prove beyond a reasonable doubt that: (1) the defendant *sold* a controlled substance; (2) the defendant knew of its presence; (3) the defendant knew of the substance's nature or character as a controlled substance; (4) the controlled substance was cocaine base; and (5) the controlled substance was in a usable amount. (CALCRIM

¹ Statutory references are to the Health and Safety Code unless otherwise specified.

² Section 11352, subdivision (a), provides: "Except as otherwise provided in this division, every person who . . . sells, furnishes, . . . or gives away . . . (1) any controlled substance specified in subdivision (b), (c), or (e), or paragraph (1) of subdivision (f) of Section 11054, specified in paragraph (14), (15), or (20) of subdivision (d) of Section 11054, or specified in subdivision (b) or (c) of Section 11055, or specified in subdivision (h) of Section 11056, or (2) any controlled substance classified in Schedule III, IV, or V which is a narcotic drug . . . shall be punished by imprisonment in the state prison for three, four, or five years."

³ Section 11351.5 provides "Except as otherwise provided in this division, every person who possesses for sale or purchases for purposes of sale cocaine base which is specified in paragraph (1) of subdivision (f) of Section 11054, shall be punished by imprisonment in the state prison for a period of three, four, or five years."

No. 2300.) Conviction of violating Section 11351.5 requires the prosecution prove beyond a reasonable doubt that: (1) the defendant unlawfully *possessed* a controlled substance; (2) the defendant knew of its presence; (3) the defendant knew of the substance's nature or character as a controlled substance; (4) *when the defendant possessed the controlled substance, he intended to sell it*; (5) the controlled substance was cocaine base; and (6) the controlled substance was in a usable amount. (CALCRIM No. 2302.) Section 11351.5 is independent and a different offense from section 11352, subdivision (a), and requires the People establish the specific intent that the cocaine base was possessed with the intent to sell it. (*In re Christopher B.* (1990) 219 Cal.App.3d 455, 466-467.) The specific intent requirement of section 11351.5 is different from the general intent requirement in section 11352, subdivision (a). (*Christopher B.*, at pp. 466-467.) Each element of each crime must be independently established to support a conviction, and a conviction of sale under section 11352, subdivision (a), does not establish guilt of possession for sale under section 11351.5. If it did, possession for sale would be a lesser included offense to sale.

Here, the People were required to prove Muhammeem possessed cocaine base with the specific intent to sell it to support a conviction under section 11351.5. (*People v. Hunt* (1971) 4 Cal.3d 231, 236.) The specific intent element required proof of Muhammeem's intent to do a further act (i.e., to sell the cocaine base) to achieve the additional consequence. (*People v. Daniels* (1975) 14 Cal.3d 857, 860; *In re Christopher B.*, *supra*, 219 Cal.App.3d at p. 466.) Whether a defendant possessed cocaine base for the purpose of sale may be and usually is established by expert

testimony regarding the quantity of the drug possessed, money possessed, packaging method, presence of drug paraphernalia, and amount held for normal use in a relatively short period of time. (*People v. Carter* (1997) 55 Cal.App.4th 1376.) If none of these factors relevant to specific intent are present, the presence of the specific intent element of possession for sale is questionable and Muhammeem's conviction of sale of cocaine base itself does not establish guilt of possession of cocaine base for sale.

The trial court properly instructed the jury on the "Union of Act and Intent: General and Specific Intent Together." (CALCRIM No. 252.) The court instructed, pursuant to that instruction, "for you to find a person guilty of [possession of cocaine base for sale] the person must not only intentionally commit the prohibited act but must do so with a specific intent or mental state. [¶] The act and the intent or mental state required are explained in the instruction for that crime." The court instructed on the elements for sections 11352, subdivision (a), and 11351.5. During closing arguments, the People established Muhammeem sold the narcotics by referring to the introduction of evidence of each element necessary for a conviction of section 11352, subdivision (a), under CALCRIM No. 2300.

However, the People never introduced evidence of the specific intent element of the crime of possession with intent to sell (§ 11351.5). The People relied on the premise that the intent requirement for the possession with intent to sell was the same as for sale. Expert testimony may validly establish intent for possession for sale based on the quantity of drug possessed, money possessed, packaging method, presence of drug paraphernalia, and amount held for normal use. (*People v. Carter, supra*, 55 Cal.App.4th

1376.) Here there was no expert testimony on the issue of possession with intent to sell. The People instead applied the elements of sale (§ 11352, subd. (a)) to establish specific intent for possession for sale (§ 11351.5), thus equating the intent element of section 11352, subdivision (a) with the intent element of section 11351.5. The People asserted the act of selling cocaine base may be used to establish guilt under section 11352, subdivision (a), and therefore at the final moment before sale, Muhammeem possessed cocaine base for sale. However, sections 11352, subdivision (a), and 11351.5 offenses must be treated, and their elements established in trial, as separate and independent crimes. To allow the elements from section 11352, subdivision (a), to satisfy elements of section 11351.5 without establishing the element of specific intent would in effect merge the two statutes, or perhaps eliminate section 11351.5 altogether. The People and the majority opinion conclude that a sale in violation of section 11352, subdivision (a), necessarily is a violation of section 11351.5 if the defendant hands the controlled substance to the buyer. That conclusion in effect makes section 11351.5 a necessarily lesser included offense to section 11352, subdivision (a), and if so conviction of both offenses is prohibited.

Because the specific intent element of section 11351.5 was not presented to the jury, there was insufficient evidence to validly support the judgment. To convict a defendant of possession for sale, the defendant must possess a controlled substance with the specific intent to personally sell it, which is shown by the quantity, packaging and normal individual use, not solely by the fact of a sale. (*People v. Carter, supra*, 55 Cal.App.4th 1376.) The evidence in this case established Muhammeem possessed

cocaine base (§ 11350) as a personal drug user, not a person with the intent to sell. Muhammeem admitted he possessed .5 grams of cocaine base purchased from "Miami." Possession of .5 grams, however, is far below the recognized quantity to infer possession for sale. (See *People v. Glass* (1975) 44 Cal.App.3d 772 [defendant possessed 228.49 grams of controlled substance]; *People v. Botos* (1972) 27 Cal.App.3d 774 [defendant possessed six kilogram bricks of wrapped marijuana]; *Carter, supra*, 55 Cal.App.4th 1376 [defendant possessed 27.4 grams]; *People v. Harris* (2000) 83 Cal.App.4th 371 [defendant possessed \$3,500-\$4,000 worth of drugs on his person]; *People v. Santana* (2000) 80 Cal.App.4th 1194 [defendant possessed nine pounds of methamphetamine]; *People v. Peck* (1996) 52 Cal.App.4th 351 [possession of 40 pounds of marijuana was sufficient to support a conviction of possession for sale]; *People v. Rodgers* (1976) 54 Cal.App.3d 508 [defendant possessed 50-60 bags of heroin packaged for sale].) One-half of a gram is a quantity recognized for personal use rather than for sale. (*Contra, Rodgers*, at pp. 514-519 [defendant possessed enough for 120 individual uses]; *People v. Hunt, supra*, 4 Cal.3d 231 [defendant possessed a two-week supply of drug]; *People v. Velasquez* (1970) 3 Cal.App.3d 776 [defendant possessed quantity in excess of what defendant might reasonably be expected to personally consume].)

Muhammeem carried the cocaine base in his cheek rather than in commonly used packaging materials. (*Contra, People v. Wesley* (1986) 177 Cal.App.3d 397 [defendant was found with a paper bindle of heroin in his waistband, and cocaine and paraphernalia for packaging in his home]; *People v. Lovett* (1978) 82 Cal.App.3d 527 [defendant possessed heroin in balloons]; *People v. Douglas* (1977) 66 Cal.App.3d 998 [defendant

was in possession of bindles of heroin].) Muhammeem also possessed drug paraphernalia. Officers found a glass pipe in Muhammeem's hat that Tagaban testified was consistent with paraphernalia of someone who possesses drugs for personal use. (*Contra, People v. Cooper* (1979) 94 Cal.App.3d 672, 676 [heroin present but without apparatus to inject it infers possession not for personal use but for sale]; *People v. Parra* (1999) 70 Cal.App.4th 222 [defendant possessed 1 kilogram of controlled substance but lacked any drug paraphernalia].) Additionally, Muhammeem carried no money except the prerecorded \$20 bill taken from Tagaban during the sale. (*Contra, People v. Santana, supra*, 80 Cal.App.4th 1194 [defendant had \$15,000 in cash]; *People v. Magana* (1979) 95 Cal.App.3d 453 [defendant had 14.25 grams of cocaine and a substantial sum of money in his home].)

A reasonable trier of fact could not have found Muhammeem guilty beyond a reasonable doubt as to count 2 because the People did not produce evidence of the requisite specific intent element under section 11351.5. Thus, there was insufficient evidence to support the conviction on count 2.

McDONALD, J.